Fundamental Rights as Bycatch – Russia's Anti-Fake News Legislation

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On 18 March, following approval by President Putin, Russia's controversial anti-fake news legislation entered into force. Russia is not the only state to address the issues of hate speech or fake news with legislative means, with Germany and France, for example, having already implemented respective laws. The Russian legislation, however, raises serious constitutional concerns, particularly due to its imprecise and overly broad scope of application.

It has already been outlined how the recent trend within Russian legislation related to the internet should be taken seriously, not only because of its clear negative implications for freedom of speech domestically, but also because of its possible external negative influence. The main concern is that such a trend could accelerate the ongoing process of decline of liberal constitutionalism in some central and eastern EU Member States, including above all Poland and Hungary.

The new anti-fake news legislation confirms this illiberal trend, amplifying already existing concerns. The Institute for Law and Public Policy in Moscow hosted an international workshop on 22 March which critically discussed the new legislation. The following thoughts are based on the impressions collected during the discussions.

A brief outline of the new legislation

The new legislation is based on two main pillars: first, the "law on fake news" (Federal Law of 18.03.2019 No. 31-FZ On Amendments to Article 15-3 of the Federal Law On Information, Information Technologies and on Information Protection); and secondly the "lack of respect for the authorities" (Federal Law of 18.03.2019 No. 30-FZ On Amending the Federal Law On Information, Information Technologies and Information Protection).

The first pillar of the legislation targets "unreliable information", which is defined rather vaguely as "unreliable socially significant information disseminated under the guise of reliable messages, which creates a threat to life and (/or) the health of citizens or property, the threat of mass disturbance of public order and (/or) public safety, or the threat of creating or impairing the proper operation of vital elements of transport or social infrastructure, credit institutions, energy facilities, industry or communications".

The watchdog is the *Roskomnadzor* – "Federal executive body responsible for the control and supervision of mass media, mass communications, information technology and communications" – which acts upon any claims alleging socially

significant unreliable information lodged by the State Prosecution Service either *ex officio* or following a complaint by a third party.

The *Roskomnadzor* "immediately notifies the editors of the online publication about the need to delete the information concerned and lodges the date and time of such notification to the editors of the online media in the information system". After receiving notification from the *Roskomnadzor*, an online media outlet must delete "unreliable information". If it does not comply, the *Roskomnadzor* will request internet service providers to restrict access to the internet. Upon receipt of such a request, operators are obliged to immediately limit access to the website.

With regard to the second pillar of the new legislation, which addresses "lack of respect for the authorities", the law provides for the blocking of access to any "information expressed in an indecent form that offends human dignity and public morality, or displays obvious disrespect for society, the state, the official state symbols of the Russian Federation, the Constitution of the Russian Federation or the bodies exercising state power in the Russian Federation".

The mechanism, in short, works as follows:

- The Prosecutor-General of the Russian Federation or his/her deputies lodge a claim with the *Roskomnadzor*, requesting the latter to take steps to remove any information falling under this highly imprecise definition and to restrict access to any information resources that disseminate any such information, if the information is not deleted;
- the *Roskomnadzor* determines the hosting provider (or any other organisation that serves the site) of the information resource;
- the *Roskomnadzor* sends an electronic notice to the hosting provider in Russian and English concerning the violation of the procedure for disseminating information;
- after receiving the notification, the hosting provider is obliged to immediately inform the owner of the information resource of the need to delete the information;
- The owner is obliged to delete the information within 24 hours of receipt of notification from the hosting provider. If it fails to do so, the hosting provider is obliged to limit access to the information resource 24 hours after receipt of *Roskomnadzor* notification;
- If the hosting provider does not comply with the request, the *Roskomnadzor* will ask communication operators to limit access to the information source.

The relevant comparative context: constitutional values at stake and legislative options

This is not the first time that state legislation has attempted to address the issue of online disinformation. In fact, European constitutionalism (in contrast to US constitutional law) at least in theory provides a favourable environment for such legislation. More specifically, whilst it may be the case that there is "no such thing as a false idea" under the First Amendment, protection for freedom of expression

in Europe is more limited than in the US (regarding this matter one need only compare the wording of the First Amendment of the US Constitution with Article 10 of the European Convention on Human Rights). However, it is not simply a question of difference in scope, but also of difference in focus. Whilst the First Amendment focuses on the active dimension, i.e. the right to express freely one's own thoughts, Article 10 of the European Convention (but also Article 11 of the Charter of Fundamental Rights of the European Union) emphasises the passive dimension, i.e. the right to be pluralistically informed. In this respect, it could be argued that fake news is not constitutionally covered by the European vision of free speech.

The real challenge in Europe is not then – as in the US – *if* the issue of fake news can be tackled legally, but rather *how* this can be done in order to avoid a disproportionate restriction on the fundamental rights at stake, above all the freedom of speech.

Before the Russian legislation was enacted, the status quo in Europe involved two main options. The European Union Commission chose to invest, at least initially, in self-regulation by platforms and thereafter, when there was no significant improvement, proposed to engage in a process of co-regulation, provided that a legal basis could be found in the EU treaties.

By contrast, German law chose a stricter approach with the adoption of The Network Enforcement Act (NetzDG).

It is thus no coincidence that the *travaux préparatoires* of the Russian legislation refer to the NetzDG as a model, and as supposed confirmation of the constitutionality of the proposed legislation. However, whilst the German legislation has been criticised for its alleged conflict with the freedom of speech, its two most contestable points (incentive to "over-block" and privatisation of justice) are not comparable, in terms of constitutional concerns, with those of the Russian legislation.

1. The German legislation concerns a much more specific issue of disinformation (fake news in conjunction with hate speech) and does not allow for arbitrary decision-making since it relies on well-defined concepts already present in German law; the Russian definitions, on the other hand, are incredibly vague, leaving significant discretion to the authorities. Let us take as an example the definition of the expression underlying the law on "lack of respect for the authorities". The legal meaning of the notion of "obvious disrespect" is unclear. The practical result seems basically to be to discourage civil society and journalists from criticising government bodies or institutions. By contrast, according to the ECtHR, as well as the Supreme Court of the Russian Federation, politicians may be subject to even more severe criticism, precisely due to their public role. Russia's Supreme Court held in that regard that public criticism of officials (professional politicians), their actions and convictions should not in all cases be considered as an action aimed at humiliating the dignity of a person or a group of people, since the limits of permissible criticism are broader for these persons than for average individuals.

2. The German legislation envisages the need for a “judicial stage”. More specifically, if the administrative authority wishes to issue a decision relying on the fact that content that has not been removed or blocked is unlawful, it must first obtain a court order establishing such unlawfulness. Under the Russian legislation on the other hand, it is prosecutors rather than the courts that decide to block the information. Consequently, the presumption of innocence is replaced with a presumption that state authorities are best placed to assess the degree to which certain pronouncements are “fake” or “disrespectful”.

3. The German legislation does not target online newspapers, whereas the Russian legislation includes them within its scope.

4. The German legislation only imposes an obligation to remove unlawful content, whereas the Russian legislation requires operators to limit access to the entire information resource, which would essentially mean obscuring the entire social media or newspaper concerned in Russia. There is a huge problem in terms of the proportionality of such a measure, also because internet access is considered to constitute a fundamental right. More specifically, the French Constitutional Council has clarified in *Hadopi* (2009-580) that, even if access to the Internet is not a fundamental right *per se,* it is a precondition for the enjoyment of the freedom of communication, which is protected by Article 11 of the Declaration of the Rights of Man and of the Citizens (1789).

5. The German legislation foresees fines for platforms (legal entities) in case of non-compliance, whereas the Russian legislation provides for very high administrative fines also for individuals, resulting in a clear collateral censorship spillover effect.

Next steps

During the discussion at the Moscow workshop it became clear that the legislation violates not only fails to meet ECHR standards, but is also incompatible with the case law of the Russian Constitutional Court. Specifically, the Russian Constitutional Court requires any restrictions of freedom of speech to be proportionate[1)]Russian Constitutional Court, judgments of February 18, 2000 No. 3-P, of November 14, 2005 No. 10-P, of December 26, 2005 No. 14-P, of July 16, 2008 No. 9-P, June 7, 2012 No. 14-P, March 12, 2015 No. 4-P. as well as to satisfy the need for legal certainty[2)]Russian Constitutional Court, judgments of April 25, 1995 No. 3-P, of July 5, 2001 No. 11-P, of April 6, 2004 No. 7-P, of December 20, 2011 No. 29-P. in relation to legal definitions.

When I asked the most ardent opponent whether there is there any chance that the Constitutional Court might overturn the legislation, the answer was quite telling: “We need a brave enough lawyer ready to raise a constitutional complaint before the Constitutional Court.”

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References

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- 2. Russian Constitutional Court, judgments of April 25, 1995 No. 3-P, of July 5, 2001 No. 11-P, of April 6, 2004 No. 7-P, of December 20, 2011 No. 29-P.
